No. 87-1421

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

THE CITY OF COLUMBUS, OHIO, et al.,

Petitioners,

v.

ANN BRUNET, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it dismissed as moot the appeal of petitioners from a Title VII liability judgment and an injunction because the petitioners had complied with an enumerated portion of the injunction after their motion for a stay of the enumerated portion had been denied by both the district and appellate courts?

2. Did the Court of Appeals err when it dismissed as moot the appeal of petitioners from a Title VII liability judgment and an injunction holding the judgment entry filed by the Court was improper, result of the dismissal being res judicata upon the issues raised in the appeal?

3. Did the Court of Appeals apply a technical rather than a practical determination of finality which precluded petitioners from Court of Appeals review of the District Court decision which was in conflict with the Supreme Court and Court of Appeals decisions?

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STATEMENT OF THE CASE

The respondents in their Brief in Opposition contend that the petitioners misstated the findings of the District Court and the Appeals Court below in several instances. The petitioners disagree. The complaint was filed as a class action pursuant to 42 U.S.C. § 2000e-5 (f) and 42 U.S.C. § 1983 alleging females were discriminatorily denied firefighter positions from the 1980 and 1984 examinations. The respondents alleged that the written tests and the physical capabilities test ("PCT") had an adverse impact upon females and was not content valid nor job related. The District Court dismissed the claims of the 1980 and 1984 female applicants under 42 U.S.C. § 1983 and granted, pursuant to F.R. Civ. 41 (B), judgment for the petitioners on the Title VII claims of the 1980 female applicants. See Appendix 57a and Appendix 31a. The District Court found that there was adverse impact upon females in the 1984 PCT and that the PCT was not content valid. See Appendix 145a. The Court requested the parties to submit written proposals for consideration in fashioning a remedy. Appendix at 149a.

The respondents' characterization that the petitioners in their proposed remedy for the first time informed the Court that they had voluntarily administered a different test for hiring of the entrance level firefighters and that they were not using the 1984 test for further hiring is false. The Court at trial heard testimony that the Civil Service Commission had been preparing a new written examination and PCT for two years. The Court had, at several status conferences, advised the parties not to get involved in the new entrance examination being developed and administered. The Court sustained an objection by the petitioners when respondents counsel attempted to cross-examine during the trial the head of testing for the Commission on changes on the new 1986 examination. The Court was well aware that in December 1985 a new written examination had been administered and that incumbents were tested on the new PCT in January of 1986, prior to trial.

In the petitioners' proposed remedy to the District Court, the petitioners proposed that the City prepare a written report on content validity. The petitioners also indicated that they had, since March of 1986, discussed

with Dr. Landy procedures for a criterion-related validity study of the 1986 firefighter examination utilizing the firefighters tested on the 1986 PCT. They proposed a concurrent validity study to compare the performances of these firefighters with their performances on the job. The petitioners never suggested to the District Court that a predictive criterion-related validity study would be implemented in order to validate rank-ordering, but rather, pointed out that they were considering a predictive study to follow the development of those candidates selected from the 1986 examination as they progressed through the Division.

The petitioners have never abandoned their issue upon appeal that the District Court's Order that they could not use the 1986 test in rank order unless the petitioners produced evidence to justify rank-order hiring through content validity and both a predictive and concurrent criterion-related validity study exceeded the professional standards of industrial psychology and the Uniform Guidelines. See Appendix 166a.

On August 3, 1987, the petitioners filed their concurrent criterion-related validity study required in the

May 30, 1986, injunction. Id. Previously, the petitioners had filed their report on the content validity of the 1986 firefighter entrance examination. As of this reply brief the petitioners have yet to commence the predictive criterion-related validity study since the first thirty-six (36) firefighters hired from the 1986 examination will only be on the Division one year May 6, 1988. To do the study the Civil Service Commission must follow 150 or more graduates through their three (3) years of continuous training within the Division. It was this fact, that it would take 4 to 5 years before the petitioners could complete the predictive criterion-related validity study, that was argued to the Court of Appeals as to why the May 30, 1986, injunction was not moot.

The petitioners, in July 1986, requested a modification of the injunction to permit the hiring of firefighters pending the appeals and the content-validity study. The District Court permitted the hiring of 72 firefighters from the 1986 examination as long as there were set aside positions for 1984 and 1986 females. The respondents in brief contend that the petitioners

waived rights to the objection of the proportional hiring requirement because the petitioners did not appeal or seek a stay of the modified injunction or the other requirements of the May 30, 1986, injunction but rather, complied with the injunctions. The District Court in its modification found that, due to normal attritions, the City of Columbus would require at least 60 new firefighters by early 1987 in order to maintain the undermanned status quo. The Court found that "failure to fill these positions would jeopardize the health, safety and welfare of the lives and property of the citizens of Columbus." Brunet v. City of Columbus, 642 F. Supp. 1214, 1255 (S.D. Ohio 1986). The District Court further stated, "continuing the injunction creates a significant risk of irreparable injury to the City of Columbus and its citizens." Thus, the District Court agreed with petitioners that the City was faced with a critical situation regarding firefighters.

The petitioners continued to comply with the Court's requirement of submitting a content validity report, cut-scoring proposals and testing of 1984 females study while proceeding with its appeals to the Sixth Circuit. In December 1986 the petitioners hired

the first 36 of the 72 interim firefighters, including one 1984 female applicant and three (3) 1986 female applicants. The female applicants were calculated using the provisions of the modification which fulfilled the intent of paragraph 6 (sic) of the May 30, 1986 Opinion and Order (Appendix at p. 172a).

In March 1987, the District Court conducted an evidentiary hearing on the content validity of the 1986 firefighter entrance examination. The District Court concluded that the 1986 PCT, without the hose hoist event, was content valid and the use of the test was authorized for selecting future firefighter classes. Appendix at 249a. On June 12, 1987, the District Court, in fulfillment of the enumerated terms of the May 30, 1986, injunction, ordered the petitioners to hire an additional 1984 female applicant for the next firefighter class. The District Court additionally ordered the petitioners to proportionally hire male/females for all future firefighter classes. Appendix at 260a-261a.

The petitioners requested a stay from the proportionally hiring requirement of the 1984 female and the 1986 females pending the appeals set for oral argument on August 4, 1987. The petitioners argued the require-

ment to hire the 1984 and 1986 females would substantially harm the status quo between the parties and harm the citizens of Columbus. The District Court denied the stay and the Court of Appeals denied the emergency motion for stay. The petitioners were then required, by denial of the stay, to hire one 1984 female applicant on July 13, 1987, which satisfied any remedy obligation under the present scoring scheme of the 1986 examination. Failure of the petitioners to comply with the District Court Order could have been regarded as continuing discriminatory conduct criticized by this Court in Local 28 Sheetmetal Workers' Int'l Assoc., et al. v. E.E.O.C., ___ U.S. ___, 92 L. Ed. 2d 344 (1986).

The petitioners note that at oral argument they renewed their request of the stay of the hiring requirements which they viewed as in conflict with the Supreme Court's decision in Sheetmetal Workers, Id., but, the Court from the bench orally indicated it would never issue a stay.

The Court of Appeals on August 25, 1986, dismissed as moot the appeals. Appendix at 102. The petitioners in the petition for rehearing argued that the

dismissal as moot would be res judicata and, if the May 14, 1986, judgment was not final, that the appeal was premature, not moot. The Court of Appeals denied the petition for rehearing on October 19, 1987. Appendix at 11a. The Clerk's docket entry of the mandate from the Court of Appeals reads, "Appeal is DISMISSED as moot." (R. 245.)

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

I. THE DISMISSAL BY THE COURT OF APPEALS OF PETITIONERS' APPEAL FROM THE TITLE VI LIABILITY JUDGMENT AND INJUNCTION AS MOOT WAS IN ERROR BECAUSE PETITIONERS' COMPLIANCE WITH THE INJUNCTION HAD BEEN UPON PROTEST.

The respondents' characterized that the Court of Appeals Decision did not dismiss as moot petitioners' entire appeal, but rather only the appeal from the injunction. This is contrary to the plain language of the Decision. Appendix at 10a. The docket entry of the mandate from the Court of Appeals, through which the Court speaks, similarly reads: "Appeal is DISMISSED as moot." (R. 245.) (Emphasis added.) Petitioners' contended in their Motion for Reconsideration and pointed out in their Petition for Writ of Certiorari that if the Court of Appeals was correct that there was no

"final" judgment on liability, the appeal on the liability was, at least, premature not moot. The dismissal of the appeals as moot without clear specification as to what they were dismissing as moot was error and prejudicial to the rights of the petitioners. See Petition for Certiorari, p. 27.

The respondents argue that petitioners voluntarily complied with the terms of the injunction when they "voluntarily and affirmatively revised and administered a new test." If the petitioners revision and administration of a new test in 1986 was the act which mooted this injunction, then the cause of action and trial itself was inappropriate and moot. The respondents were well aware that the petitioners had been actively revising the testing process since September 1984. The respondents and the Court were aware that in December 1985, three months before trial, a new written examination was administered to fire applicants. The District Court on numerous occasions advised the respondents that there could not be any discovery into the new examination as that was not an issue before the Court. In fact, many of the enumerated terms of the May 30, 1987, injunction had been performed by the

petitioners prior to trial, i.e., administration of the PCT to encumbent firefighters, the preparation of data for a content-validity report, and planning for a concurrent criterion-related validity report.

The respondents try to confuse the issue as to what act amounted to compliance with the injunction. The respondents characterized the revision and administration of a new test as compliance with the injunction when, in fact, the Appellate Court felt the compliance was the July 13, 1987, hiring of the one additional 1984 female applicant satisfying a court ordered liability for the 1984 examination and the new injunction of June 12, 1987. Paragraph 6 of the May 30, 1986, Opinion and Order required the petitioners, before they could hire on the basis of the 1986 examination, to set aside a number of places determined by paragraph 5 (sic) for 1984 females. After this 1984 hiring had been accomplished, then and only then, could defendants hire males and females in proportion to the 1986 examination. See Appendix, p. 172a. The Court in its July 24, 1986, modification continued the requirement that in the interim classes that an appropriate number of spaces would be reserved for 1984 female applicants.

642 F. Supp. at 1258. The Opinion and Order of May 21, 1987, provided that after the rescoring of the 1986 PCT, the defendants were to determine whether there should have been more 1984 females appointed in the first interim class and to reserve spaces for those females in the next interim class. Once that is accomplished, the petitioners were to select males and females in each class not "inconsistent with any prior orders of this court." Appendix, at 252a. (Emphasis added.) The June 12, 1987, Opinion and Order ordered the defendant to hire an additional 1984 female applicant for the next interim fire class and that no further 1984 female hires were then necessary. Appendix, at 260a.

The spirit and direction of all of these Opinions and Orders were contingent upon fulfilling the initial injunction of May 30, 1986. The petitioners requested a stay from both the District Court and the Court of Appeals from the 1984 and 1986 female hiring requirement for the interim class and for subsequent fire classes. Both the District Court and the Court of Appeals in writing and verbally have denied such a stay.

The petitioners did not revise and administer a new test pursuant to the injunction of May 30, 1986.

The new examination was planned since September of 1984 and developed during the Spring, Summer and Fall of 1985. The content-validity and concurrent criterion-related validity reports were planned and started prior to the District Court's opinions and orders. Petitioners should not be denied their right of appeal for performing acts before they were even mandated.

The petitioners admit that they hired female applicants, one from the 1984 and two (2) from the 1986 class list pursuant to the District Court's interim hiring order in December 1986. As the District Court indicated in its modification, the City was faced with a critical shortage of firefighters and the imminent loss of more firefighters. The City accepted this interim requirement pending the full liability calculations after the content validity hearing. These full calculations resulted in the hiring of one additional (or a total of two) 1984 females in satisfaction of the liability judgment and injunction of May 1986. It is from this second hiring and fixing of our liability that the petitioners sought the stay.

The petitioners, unlike the City of San Francisco in the Western Addition Community Organization, et al. v. Alioto, et al., 514 F.2d 542 (9th Cir. 1975), did not voluntarily perform the act which sought to be appealed rendering the case moot. As in International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977), the petitioners, after repeated denials of their stay, were faced with contempt if they failed to comply with the orders of the District Court. The petitioners faced an on-going critical need for additional firefighters. If they had failed to hire additional firefighters, with proportional female representation, while they awaited the appellate process, the entire City of Columbus would be placed at personal jeopardy. The petitioners contend that the involuntary compliance with the District Court's orders should not prejudice their rights of appeals.

It must be noted that respondents do not argue in brief that petitioners have completed all the terms of the May 30, 1986, injunction. All are aware that the predictive study cannot be completed for years.

II. THE DISMISSAL BY THE COURT OF APPEALS OF THE PETITIONERS' APPEAL FROM A TITLE VII LIABILITY JUDGMENT AND INJUNCTION AS MOOT RESULTS IN A RES JUDICATA EFFECT, DEPRIVING THE PETITIONERS OF THEIR CONSTITUTIONAL RIGHT OF APPEAL.

The petitioners and respondents agree that in United States v. Munsingwear, 340 U.S. 36 (1950), this Court concluded the United States failure to move to vacate the lower court's judgment, when their appeal was dismissed as moot, amounted to an acquiescence of the dismissal. The petitioners, however, maintained that they have never acquiesced in a dismissal and, in fact, raised the issue of res judicata to the Court of Appeals in their Motion for Reconsideration.

The respondents contend that the fact that the petitioners did not use a motion to vacate when they raised the issue of res judicata waived the petitioners' right to raise this issue. However, this Court held in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936), "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and remand the cause with directions to dismiss." (Emphasis

added.) See also Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979). The petitioners raised the effect, the appellate court failed in its duty.

The respondents did admit in brief that a motion to vacate the judgment was not appropriate because of the continuing litigation before the District Court. Crowell v. Mader, 444 U.S. 505 (1980). The District Court supervision of the 1986 examination stems from the liability in the underlying Title VII cause of action. The petitioners could not, in the spirit of Munsingwear, move the Court of Appeals to remand and direct the District Court to vacate the judgment because of this Court's holding in Crowell. However, res judicata of the items on appeal could prejudice the petitioners in the 1986 PCT.

The respondents cite Gjertsen v. Board of Election Commissioners, 751 F.2d 199 (7th Cir. 1984), in which a case became moot pending appeal. The defendants had filed a notice of appeal but were denied a stay. The primary election was held pending appeal. As Judge Posner pointed out, a vacation of the interlocutory order was not proper because the case was not moot. The judge noted, however, there were situations

where interlocutory orders may be given collateral estoppel effect in subsequent litigation. Id. at 202. There are provisions of the May 30, 1986 injunction, i.e., the predictive and concurrent validity studies before any rank-order hiring, which could be used collaterally in subsequent litigation over fire entrance testing.

The respondents contend that the petitioners have failed to show how any res judicata effect of the dismissal has caused them harm. The petitioners, however, have argued that this dismissal may prevent review of the findings of the District Court and its holding regarding the 1986 examination because the previous holdings in the 1984 PCT "law of the case." The District Court's evaluation of the adverse impact, using the wrong statistical standard, and its strict proportional requirement of the job on the test has become the criterion for review of petitioners' subsequent examinations. This failure of the Sixth Circuit to review the erroneous statistical criterion of the District Court, in conflict with EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983), rev'd on other grds., 467 U.S. 867 (1984); Palmer v. Schultz, 815

F.2d 84 (D.C. Cir. 1987), strict proportional requirements of job content on the examination, in conflict with Guardian's Assoc. v. Civil Service Comm., 630 F.2d 79 (2nd Cir. 1980), cert. denied, 452 U.S. 940 (1981), and the proportional hiring requirements, in conflict with Local 28 of the Sheetmetal Workers' Intl. Assoc. v. EEOC, supra, and Wygant v. Jackson Bd. of Educ., 476 U.S. ___, 90 L. Ed. 2d 260 (1986), has become the "law of the case" denying the petitioners' right of appellate review.

III. THE COURT OF APPEALS' DETERMINATION OF FINALITY IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Court of Appeals appears to have found, since the District Court was examining the content validity of the 1986 examination at the time of the appeal, that there was on-going litigation in the District Court and thus no final judgment. This Court, however, has found that a final decision is one which "ends the litigation on the merits and leaves nothing to the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). (Emphasis added.)

There is no dispute that the liability of the petitioners on the 1984 PCT was fixed by the Opinion and Order of May 13, 1986. See Appendix 12a and 156a. There was no new complaint filed regarding the 1986 test. The District Court in March 1987 conducted an "evidentiary hearing," pursuant to the term of the 1986 injunction, regarding the content validity of the 1986 PCT because liability had been fixed and a remedy determined. The District Court was not litigating liability between the parties but rather taken evidence regarding the petitioners compliance with its previous injunction. Heike v. United States, 217 U.S. 423 (1913).

The respondents contend that the petitioners have failed to identify where the Court of Appeals erred in holding the decision not final. The petitioners have continually contended, even in response to questions from the appellate panel whether the judgment entry complied with the contents of the complaint, that the judgment entry of May 14, 1986, did comply with F. R. Civ. P. 54 and the counts of the complaint. The Court of Appeals has misunderstood and the respondents have mischaracterized the nature of the litigation

between the parties in the District Court regarding the content-validity report and the concurrent criterion-related validity report as on-going litigation on the merits. It is not.

The Sixth Circuit has held that a:

> Final judgment is one which disposes of the whole subject, gives the relief that is contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause say superintend, ministerial, the execution of the decree. City of Louisa v. Levi, 140 F.2d 512, 514 (6th Cir. 1944).

Thus, the Sixth Circuit has itself conflicted with its own previously enunciated principle regarding practical versus technical application of finalities as well as conflicted with this court's decisions regarding the finality rule.

As the counsel for the petitioners pointed out at oral argument, if the Court of Appeals was correct, that because there were remedy matters before the District Court, there would never be a final judgment in this matter because it would take the petitioners approximately five (5) years to complete the predictive criterion-related validity report. Such a technical application by the Sixth Circuit is contrary to the practical application of finality enunciated in Cohen v. Benefical Industrial Loan Corp., 337 U.S. 541 (1949).

CONCLUSION

The petitioners respectfully request the Supreme Court that this petition for certiorari be granted. The petitioners believe the questions presented raise substantial issues regarding constitutional rights of appellate review, as well as conflicts between the Court of Appeals and prior decisions of the Supreme Court and other circuits.

Respectfully submitted,

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